Teknik Segala Sdn Bhd v Salcon Engineering Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–2167 OF 2007
ZALEHA YUSOF J
17 JANUARY 2012

Contract — Claims for work done — Breach — Incomplete materials or works — Whether entitled to claim for balance and sums for variation works — Whether there was variations of contract — Legal burden of proving completed works

The plaintiff entered into a contract with the defendant for the supply, delivery, installation, testing and commissioning of Supervisory Control and Data Acquisition ('SCADA') system for the Sungai Kinta water treatment project ('the works'). On 2 November 2006, the plaintiff had removed the entire programmable logic controller ('PLC') programme from relevant computers of the project site. The defendant then issued a notice terminating the contract on 22 November 2006. The plaintiff contended that it had completed the works on or before the completion date but the defendant had failed to pay RM809,068.95 of the contract sum balance and sums for variation works. The defendant argued that the plaintiff was not entitled to such claim because the plaintiff had not completed materials or works. Furthermore, the defendant contended that the plaintiff was not entitled to any part of the variation order claims because they were related to materials and works that were within the scope of the contract or materials and works that were not instructed or authorised by the defendant. Since the defendant had to engage other contractors to complete the outstanding materials and/or works, the defendant counterclaimed for a sum of RM179,000. The issues before the court related to the plaintiff's claim for payment of part of the contract sum and for the plaintiff's claim for variation work, which were sums outside the contract.

Held, dismissing the plaintiff's claim and allowing the defendant's counterclaim with costs:

(1) The plaintiff's evidence and submission that there was a variation as to the mode of payment must be rejected. There was no evidence to support the allegation of variation and nor was there suggestion in the plaintiff's pleadings that cl 10 of the contract had been amended in any way. The plaintiff in its submission placed the burden on the defendant even though it was its duty and not the defendant to prove the plaintiff's case. Since it was the plaintiff who alleged the variation of contract, the burden was on it to prove this fact (see para 16).

(2) The evidence showed that the plaintiff did not, up to the date of

termination on 22 November 2006, complete the SCADA and PLC programming on site. The legal burden of proving his value of work was on the plaintiff. However, the plaintiff has failed to adduce any direct documentary evidence to prove that it had completed the SCADA and PLC programming on site. The plaintiff was not entitled to any sum for the SCADA and PLC programming that was removed from the site as this did not fulfil the requirement for the work (see para 26).

(3) Since the contract was a lump sum contract the plaintiff must prove that there was an agreement between the parties for variations and additional works in order for it to recover further payments. There was no agreement between the parties for any variation (see para 37).

(4) The contract was terminated on 22 November 2006 and the extension requested by the defendant was until November but the actual delivery was only done in December. The face remained crystal clear that the plaintiff had failed to comply with the time line and the defendant must then be allowed to claim for the sum of RM179,000 (see para 47).

(5) The termination of the contract by the defendant was lawful. Although excuses were provided, they do not particularly explain why the plaintiffs seriously delayed in completing the SCADA and PLC programming, which the plaintiff acknowledged should have been completed off site. The plaintiff was also in repudiatory breach when it demobilised from site from 20 November 2006 and when it removed the entire SCADA and PLC programming from computers on site on 21 November 2011. This removal was without the defendant's consent. In fact, the SCADA and PLC programming once delivered to site was deemed the property of the defendant and could not be removed (see paras 52–53).

[Bahasa Malaysia summary

Plaintif memasuki kontrak dengan defendan untuk pembekalan, penghantaran, pemasangan, pengujian dan melaksanakan sistem Supervisory Control and Data Acquisition ('SCADA') untuk projek rawatan air Sungai Kinta ('kerja-kerja'). Pada 2 November 2006, plaintif telah memindahkan keseluruhan program alat kawalan logik yang diprogramkan ('PLC') daripada komputer-komputer relevan dari tapak projek. Defendan kemudiannya mengeluarkan notis menamatkan kontrak pada 22 November 2006. Plaintif berhujah bahawa ia telah menyelesaikan kerja-kerja tersebut pada atau sebelum tarikh siap tetapi defendan telah gagal untuk membayar RM809,068.95 baki jumlah kontrak dan wang untuk kerja-kerja variasi. Defendan berhujah bahawa plaintif tidak berhak kepada tuntutan sedemikian kerana plaintif tidak menyelesaikan material atau kerja-kerja. Selanjutnya, defendan berhujah bahawa plaintif tidak berhak kepada mana-mana bahagian tuntutan perintah variasi kerana ia berkaitan kepada material dan kerja-kerja yang adalah dalam skop kontrak atau material dan kerja-kerja yang tidak diarahkan atau

dibenarkan oleh defendan. Memandangkan defendan telah mengambil kontraktor lain untuk menyiapkan material dan/atau kerja-kerja yang tertunggak, defendan menuntut balas untuk sejumlah RM179,000. Isu-isu di hadapan mahkamah adalah berkaitan tuntutan plaintif untuk pembayaran bagi bahagian jumlah kontrak dan tuntutan plaintif untuk kerja variasi, yang mana adalah jumlah di luar kontrak.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan dengan kos:

(1) Keterangan plaintif dan penghujahan bahawa terdapat variasi terhadap cara pembayaran mesti ditolak. Tidak terdapat keterangan untuk menyokong dakwaan variasi dan juga tidak terdapat cadangan dalam pliding plaintif bahawa klausa 10 kontrak telah dipinda dalam apa-apa cara. Plaintif di dalam hujahannya meletakkan beban ke atas defendan walaupun ia adalah tugasnya dan bukan defendan untuk membuktikan kes plaintif. Memandangkan plaintif yang mendakwa variasi kontrak, beban adalah ke atasnya untuk membuktikan fakta ini (lihat perenggan 16).

(2) Keterangan menunjukkan bahawa plaintif tidak, sehingga tarikh penamatan pada 22 November 2006, menyelesaikan program SCADA dan PLC di tapak projek. Beban undang-undang membuktikan nilai kerjanya adalah ke atas plaintif. Walau bagaimanapun, plaintif gagal untuk mengemukakan apa-apa keterangan dokumentar terus untuk membuktikan bahawa ia telah menyiapkan program SCADA dan PLC di tapak projek. Plaintif tidak berhak kepada apa-apa jumlah wang untuk program SCADA dan PLC yang dipindahkan daripada tapak projek memandangkan ini tidak memenuhi keperluan kerja (lihat perenggan 26).

(3) Memandangkan kontrak adalah kontrak sekali gus plaintif mesti membuktikan bahawa terdapat perjanjian di antara pihak-pihak untuk variasi dan kerja-kerja tambahan supaya ia dapat mendapatkan kembali bayaran-bayaran selanjutnya. Tidak terdapat perjanjian di antara pihak-pihak untuk apa-apa variasi (lihat perenggan 37).

(4) Kontrak ditamatkan pada 22 November 2006 dan pelanjutan yang dipohon oleh defendan adalah sehingga November tetapi penghantaran sebenarnya hanya dilakukan pada Disember. Atas fakta jelas kekal bahawa plaintif gagal untuk memenuhi dengan garis masa dan defendan mesti dibenarkan untuk menuntut wang jumlah RM179,000 (lihat perenggan 47).

(5) Penamatan kontrak oleh defendan adalah sah. Walaupun alasan diberikan, ia tidak secara tertentu menjelaskan mengapa plaintif-plaintif secara serius lewat dalam menyiapkan program SCADA dan PLC, yang

mana plaintif mengakui sepatutnya disiapkan di luar tapak projek. Plaintif juga berada dalam kemungkiran apabila didemobilisasikan daripada tapak dari 20 November 2006 dan apabila ia memindahkan keseluruhan program SCADA dan PLC daripada komputer-komputer di tapak pada 21 November 2011. Pemindahan ini adalah tanpa izin defendan. Sebenarnya, program SCADA dan PLC sebaik sahaja ia dihantar ke tapak ia dianggap harta defendan dan tidak boleh dipindahkan (lihat perenggan 52–53).]

Notes

For a case on claim for work done, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 3525.

Cases referred to

CM Indah Sdn Bhd v UB Usahabina Sdn Bhd [2006] MLJU 426; [2006] 4 CLJ 733, FC (refd)

Desa Samudra Sdn Bhd v Bandar Teknik Sdn Bhd & Ors [2012] 1 MLJ 729, FC (refd)

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627, CA (refd)

Kanagasabai Satkuru v United Malayan Banking Corp Bhd [1981] 2 MLJ 23; [1981] 1 LNS 74, FC (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428; [1991] 1 CLJ (Rep) 239, SC (refd)

Selvaduray v Chinniah [1939] 1 MLJ 253 (refd)

Legislation referred to

Contracts Act 1950 s 40

Evidence Act 1950 ss 92, 101, 103, 114(g)

William Edwin a/l Edwin John (Chambers of William Edwin) for the plaintiff.
Chua Ai Li (Cheng Khang Chween with him) (Azman Davidson & Co) for the defendant.

Zaleha Yusof J:

[1] This case involves a contract for the supply, delivery, installation, testing and commissioning of supervisory control and data acquisition ('SCADA') system and local control panel ('LCP') for the Sungai Kinta Water Treatment Project ('the works'). The plaintiff entered into a contract with Salcon-Trans Consortium ('STC'), an unincorporated venture company to complete the works. The defendant was the managing partner of the joint venture. The contract entered by the parties was in the form of a works order dated 2 November 2004 which comprised of the documents and appendixes attached

thereto, ('the contract'). It is an agreed fact that the plaintiff had on 22 November 2006 removed the entire programmable logic controller ('PLC') programme from the relevant computers on the project site. It is also an agreed fact that the defendant had issued a notice dated 22 November 2006 for the termination of the contract ('termination notice').

[2] It has been agreed by the parties that:

(a) the terms of the contract included, inter alia:

(i) the contract sum was RM1,790,000;

(ii) term of payment was 60 days from the date of completion of each milestone and submission of invoice; and

(iii) the delivery date was August 2005.

(b) The payment term as set out in cl 10 of the contract as follows:

(i) Payment terms
60 days upon completion of each milestone and submission of an invoice.

(ii) Progress terms
10% upon design drawing submission and approval

(iii) 75% upon Factory Acceptance Test (FAT) and site delivery
10% upon site testing and commissioning
5% retention for 12 months after commissioning.

[3] The plaintiff has pleaded that it had completed the works on or before the completion date but the defendant had failed to pay RM809,068.95 comprising the balance of the contract sum and sums for variation works.

[4] It is the defendant's case that the plaintiff is not entitled to claim the said sum for the following reasons:

(a) the plaintiff is not entitled to claim the alleged unpaid billed sums amounting to RM273,034.50 because the sums relate to materials or works that had not been completed up to date of the termination notice;

(b) the plaintiff is not entitled to claim the alleged unbilled sums amounting to RM198,744.45 because the sums relate to materials or works that had not been completed up to the date of the termination notice; and

(c) the plaintiff is not entitled to any part of the variation order claims amounting to RM334, 945 because they relate to materials and work that were within the scope of the contract, or materials and work that had not been instructed or authorised by the defendant.

[5] It is the defendant's case that the contract was awarded on a lump sum basis and the contract sum was to be paid for the completion of total contract obligations and works under the following payment milestones:

(a) 10% upon design drawing submission and approval;

(b) 75% upon FAT and site delivery;

(c) 10% upon site testing and commissioning; and

(d) 5% retention for 12 months after commissioning.

[6] It is the defendant's case that by the date of the termination notice, the plaintiff had not completed its total obligations and works for the second, third and fourth payment milestones. It is the defendant's case that since the plaintiff only completed its obligations and works for the first payment milestone (being the first 10% upon submission and approval of design drawings), the plaintiff was only entitled to the sum of RM179,000. The plaintiff was not entitled to any further sum under the contract's terms of payment because the plaintiff had not completed any other payment milestone under the contract as of the date of the termination notice on 22 November 2006.

[7] The defendant contends that it had made a total payment of RM1,015,754.16 to the plaintiff. This total payment consists of RM179,000 (first payment milestone 10% upon submission and approval of design drawings) and a further advance on a goodwill basis amounting to RM836,754.16. It is the defendant's case that the advance payments were made on a goodwill basis in view of pleas by the plaintiff of serious lack of cash flow. The defendant has counterclaimed for the refund of aforesaid advance payments totaling RM836,754.16.

[8] The defendant has also counterclaimed for RM179,000,000 being the agreed maximum sum for liquidated and ascertained damages (LAD) under the contract. It is also the defendant's case that the defendant had to, inter alia, engage other contractors to complete the outstanding materials and/or works under the plaintiff's scope of works, incurring substantial costs. As such the defendant has further counterclaimed for:

(a) RM598,182.59 being costs of rectification and/or completion of outstanding material and works;

(b) RM102,150 being supervision costs from December 2006 to September 2007; and

(c) RM92,742 being consulting engineer's cost from December 2006 to September 2007.

WITNESSES

[9] Three witnesses had given evidence at the trial; one for the plaintiff and the other two for the defendant. They are:

(a) PW1 — Zailan bin Amir, the plaintiff's project manager for the works;

(b) DW1 — Jamiluddin Amini bin Sulaiman, the defendant's project director; and

(c) DW2 — Tan Kok Leong, the defendant's senior project engineer.

ISSUES

[10] Issues to be tried are set out in bundle 'G'. There are five issues relating to the plaintiff's claim and three issues relating to the defendant's counter claim. The first four issues relating to the plaintiff's claim relate to the plaintiff's claim for payment of part of the contract sum. Whereas the fifth issue relates to the plaintiff's claim for variation work, which are sums outside the contract sum. They are as follows:

(a) Whether the contract sum under the contract was to be paid upon the completion of the plaintiff's obligations and works under the following milestones:

(i) 10% upon design drawing submission and approval;

(ii) 75% upon FAT and site delivery;

(iii) 10% upon site testing and commissioning; and

(iv) 5% retention for 12 months after commissioning?

(b) Whether the plaintiff had completed its obligations and works under the following milestones:

(i) 75% upon FAT and site delivery;

(ii) 10% upon site testing and commissioning; and

(iii) 5% retention for 12 months after commissioning as at the date of termination of the contract on 22 November 2006?

(c) If the answer to Issue 2 is 'Yes', whether the plaintiff is entitled to the following sums:

(i) unpaid billed sums of RM273,034.50; and

(ii) previously unbilled sum of RM198,744.45?

(d) If the answer to Issue 3 is 'No', whether the defendant is entitled to a refund of RM836,754.16 from the plaintiff?; and

(e) whether the plaintiff is entitled to variation order claim of RM344,945?

As to the defendant's counterclaim, the issues are as follows:

(f) Whether the defendant is entitled to accrued agreed liquidated and ascertained damages amounting to RM179,000?

(g) Whether, in the circumstances of the case, the defendant's termination of the contract on 22 November 2006 was lawful

(h) Whether the defendant is entitled to the following sums:

(1) Costs of rectification and/or completion of outstanding material and works amounting to RM598,182.50;

(2) Supervision costs by the defendant from December 2006 to Septembe 2007 amounting to RM102,150;

(3) consulting engineer's costs amounting to RM92,742; and

(4) additional costs (to be determined) for procurement of spare parts.

EVIDENCE AND FINDINGS

[11] As mentioned earlier, cl 10(i) of the contract as shown at p 237 of bundle B clearly provides that payment term is '60 days upon completion of each milestone and submission of an invoice'. In cl 10(ii) it provides for progress terms as follows:

> 10% upon design drawing submission and approval
>
> 10% upon site testing and commissioning and
>
> 5% retention for 12 months after commissioning.

[12] The said cl 10 has clearly provided for payment upon completion of each milestone. To me, the clause on progress payment must be read in the context and subject to the clause on payment term.

[13] However, the plaintiff has alleged that there was a variation to the mode of payment. PW1 in his evidence alleges that DW1, one Mr Jagjit Singh and three other gentlemen ie Roslee Ismail (project manager), Mohamed Azri (head of electrical and engineering) and Lee Wai Leong (engineer) were at the kick off meeting held on 26 November 2004 on behalf of the defendant. The plaintiff submits that it was during this kick off meeting that there was a variation as to

the mode of payment as PW1 in his evidence says it was instructed by Mr Jagjit Singh at this meeting that payment is to be made by the defendant on a progressive basis upon submission of the plaintiff's invoices based on the bill of quantities.

[14] Parties are bound by their pleadings. If we look at para 4 of the plaintiff's statement of claim, it is obvious that the plaintiff has pleaded and relied on the payment clause ie payment within 60 days upon completion of each milestone and submission of invoice. I observe that the fact that there was a kick off meeting which led to the variation to the term of the agreement, particularly on such an important term, ie payment, are not pleaded.

[15] The Supreme Court in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ (Rep) 239 had held that pleadings in a civil suit are very important and where a vital issue was not raised in the pleadings, it could not be allowed to be argued and to succeed. The importance of pleadings is also reflected in the Federal Court's decision in *Kanagasabai Satkuru v United Malayan Banking Corp Bhd* [1981] 2 MLJ 23; [1981] 1 LNS 74. In that case, the Federal Court dismissed the appeal after it found the issue raised by the appellant was not specifically and distinctly pleaded in his statement of defence.

[16] Hence, with due respect, I am of the opinion that the plaintiff's evidence and submission that there was a variation as to the mode of payment must be rejected. Further, there is no evidence to support the allegation of variation. In fact, during cross-examination, PW1 has acknowledged that the plaintiff's own project schedule as shown in bundle B at pp 242–247 and 250–251, which are contemporaneous documents, indicates that the plaintiff's invoices for the first, second and third milestones were to be presented after completion of all activities for the first, second and third milestone as shown in the schedule. There is no suggestion in the plaintiff's pleadings that cl 10 of the contract had been amended in any way, and the plaintiff has not adduced any evidence of any amendment to cl 10 of the contract.

[17] DW1 in his evidence has denied ever attending the so called kick off meeting. He has also firmly stated that there was no change or variation to cl 10 and his evidence has not been rebutted by the plaintiff.

[18] The plaintiff in its submission has put the burden on the defendant to produce the minutes of the kick off meeting. The plaintiff also in its submission has blamed the defendant for not calling the three gentlemen who the plaintiff alleged had attended the meeting. But the plaintiff forgets that it is the duty of the plaintiff and not the defendant to prove the plaintiff's case. Those who

allege the existence of certain facts must prove that those facts exist. Refer to ss 101 and 103 of the Evidence Act 1950 (Act 56).

[19] It is the plaintiff who alleges the variation of the contract, hence the burden is on the plaintiff to prove this fact. Refer to the decision of the Court of Appeal in *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627. In that case one of the issues was whether the burden shifted to the respondent when the appellant failed to serve the subpoena on a witness. The Court of Appeal held that according to s 103 of the Act 56, a person who alleges must prove such allegation. Thus, it was incumbent upon the appellant to produce the said witness as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of the said witness as his witness did not shift the burden to the respondent to produce the witness and testify as to what he had uttered because: (i) the respondent had never raised such an allegation; and (ii) the respondent denied even making one.

[20] The Court of Appeal in *Selvaduray v Chinniah* [1939] 1 MLJ 253 had held that when the burden of proof is not on the defendant, the defendant's failure to call a material witness would not raise an adverse presumption under s 114(g) of the Act 56. The same position was taken by the Court of Appeal in *Juahir*'s case.

[21] It must also be stressed that by virtue of s 92 of the Act 56, the plaintiff cannot rely on any oral evidence to contradict the express payment term of the contract.

[22] Based on the above, my answer to the first issue relating to the plaintiff's claim is in the affirmative.

[23] Next is the second issue. The plaintiff had tabulated in its schedule at pp 243–244 of bundle B all milestone activities for the second milestone before payment to be made ie 75% upon FAT and site delivery. Pages 244–245 of bundle B show all milestone activities for the third milestone in the plaintiffs schedule. This is for payment of 10% upon site testing and commissioning. For the fourth milestone, all the works under the contract had to be completed and 12 months had passed after commissioning and handing over of the works before payment can be made.

[24] The activities referred to for the second milestone include, first, procurement phase involving procurement of all items for the works and secondly, integration/assembly phase, which includes SCADA and PLC programming, and thirdly, the FAT phase during which all assembled and installed works including the SCADA and PLC programming are tested at the factory before delivery to site and packing and shipping to site.

[25] PW1 in his evidence agrees that the only evidence that the plaintiff is relying on to say that this milestone was completed is three delivery orders relating to LCP panels. PW1 agrees during cross-examination that the plaintiff had not procured and delivered to site (i) radio modems/panels and (ii) spare parts. PW1 has also acknowledged during cross exam that the plaintiff had not done or supplied the items listed in bundle B, p 190 as at the date of termination on 22 November 2006. PW1 admits that the SCADA and PLC programming should have been done and installed off site. DW1's evidence has shown that it was not disputed that the SCADA and PLC programming had not in fact been completed off site by the plaintiff as required for this milestone. Further, DW2 has given detailed evidence during examination-in-chief and cross-examination that the plaintiff did not, up to the date of the termination on 22 November 2006, complete the SCADA and PLC programming on site. The plaintiff on the other hand has failed to adduce any direct documentary evidence to prove that it had completed the SCADA and PLC programming on site.

[26] Further and in any event, since the plaintiff had prior to the termination on 22 November 2006 completely removed the SCADA and PLC programming that was installed in the computers on site, I agree with the defendant's submission that the plaintiff is not entitled to any sum for the SCADA and PLC programming that was removed from site. It is obvious that the SCADA and PLC programming that was removed does not fulfill the requirement for the work to be installed and delivered to site for purposes of this milestone.

[27] On the third milestone payment, PW1 admits that the only evidence the plaintiff is relying on to prove that this milestone was completed is the site acceptance test (SAT) records at pp 529–565, 570–588, 590–593, 595–602, 606–620 of bundle C, and that these SAT records are for the input/output (I/O) points test only. PW1 has further admitted during cross-examination that the plaintiff did not pass all of the I/O points tests. DW2 in his evidence has stated that the plaintiff did not complete all of the tests for the SAT. The only SAT test conducted was the I/O point test. The radio panels were not installed since they were not delivered and the system was clearly not completed for purposes of commissioning.

[28] As the second and third milestone were not even completed, it is obvious that the plaintiff would not be entitled for payment under the fourth milestone. All the works under the contract had to be completed and 12 months had passed after commissioning and handing over of the works for this milestone payment. Further there is no evidence that site training as required under the schedule at p 245 of bundle B had been conducted.

[29] I note the plaintiff's submission that the defendant did not object to progress claims invoiced by the plaintiff and had made payment pursuant to these claims. However, it is the defendant's contention and through DW1's evidence that the plaintiff had made many pleas both oral and written for such payment as shown at pp 334, 355, 392 and 395 of bundle B. Hence, it is my considered opinion, that the defendant's evidence that those payments were advances are probable, what more when the plaintiff's argument that the mode of payment has been varied is not pleaded and hence rejected by this court as stated earlier.

[30] Hence, I totally agree with the defendant's submission and my answer to the second issue is obviously 'no'. DW1 has consistently in his evidence said that the plaintiff appealed many times to STC to assist the plaintiff in its cash flow, and that STC had to assist the plaintiff in view of the serious delays. DW1 explained that the defendant made assessments of value of work completed to correspond with the amount of money to be paid to the plaintiff in order to safeguard the sum paid. During cross-examination of DW1 by the plaintiff's counsel, DW1 has said:

> Q: Q49, refer to C/505, written remark on the right side, there are amendments, aren't all these confirmations were based on the progress claim ie the BQ?
>
> A: It is the assessment by us to determine how much assistance in cash flow to be given to them. If we don't do this, it's in a real situation of advance payment, we would require the advance payment bond which we did not put that requirement in this contract. In order to safeguard the amount of money we have given to them, of course the equipment that they have given to us becoming our surety to make sure that the value of the equipment is worth what we are paying them.

[31] During re-examination of DW1, DW1 has said:

> Q: What is the purpose of this assessment made?
>
> A: To determine how much value that we can give of this special fund in order to assist the plaintiff in carry out the remaining work. And this assessment has to be made because there is nothing to guaranty this special amount of money given to them will be returned as the work was not completed. This is the reason we have to use the value of work completed as a guaranteed value corresponding to the amount of money disbursed to them.

[32] Finally, during re-examination of DW1, DW1 has explained that the defendant had a strong reason to ensure the plaintiff's works did not continue to be delayed because the defendant's cash flow would be affected:

Q: About the advances, you were asked about whether any objection was taken by the defendant on the plaintiff on the progress claim, you were also referred to the intention of the defendant because of the pleas of the plaintiff to assist the plaintiff in his cash flow, if we did not assist, it would affects the progress of works, can you please explain?

A: First of all, if the plaintiff does not need the cash, they would have stick to the original milestones payment, they won't have to write to us to plea for some special advances. Here, through verbal plea and written pleas they have actually asked for releasing of some of the money even though some of milestone was not complete. We actually have released the whole 10% of money to them with hope that they can accelerate it as far as the progress of work is concerned.

Q: Did the plaintiff accelerate as what you have mentioned?

A: Not really.

Q: After 1st milestone payment, did the plaintiff request or make pleas as mentioned for further payment?

A: Refer to few letters, for example letter dated 5.12.2005 at page 334, 355, 392, 395 (page 25 of my witness statement), Q & A 31.

Q: Why did STC continued to assist the plaintiff in their cash flow? If not assist, will

A: We will worry that by not assisting them in cash flow, it will definitely going to affect the progress of work, because looking at the whole progress even with the financial help also is affecting the progress of the work in terms of delay and so on.

Q: Would the progress of work by the plaintiff affect the defendant's case flow returns under main contract?

A: Yes, this is relevant to the plaintiffs work, definitely will affect our cashflow.

[33] In any event, it is the plaintiff who bears the legal burden of proving his value of work done is as per the sum claimed. PW1 agrees during cross examination that the plaintiff is claiming 100% of the contract sum for the items of work done. However the evidence adduced before me clearly shows that the plaintiff is not entitled to 100% of the contract sum for the items claimed as it has not fully completed the works.

[34] The defendant has on the other hand adduced evidence of the assessment by DW2 for the work done by plaintiff up to 22 November 2006. The total sum assessed by DW2 is RM1,015,750.15. This is reflected at pp 718–722 of bundle C. DW2's assessment is not challenged by the plaintiff during cross-examination. Through this assessment of DW2 it shows that there is no sum owing by the defendant to the plaintiff because the defendant had previously paid a total of RM1,015,754.05, which is slightly more than the sum assessed by DW2.

[35] As the answer to Issue 1 is 'yes' and Issue 2 is 'No', it follows that, based on the reasons given, the answer to Issue 3 is obviously 'No' and the answer to Issue 4 is 'Yes'.

[36] The fifth issue is the variation issue. The defendant claims that this is a lump sum contract. What is a lump sum contract is clearly explained in *CM Indah Sdn Bhd v UB Usahabina Sdn Bhd* [2006] MLJU 426; [2006] 4 CLJ 733 when Justice Low Hop Bing (as he then was) quoted with agreement the following:

> [14] In *Building Contract Litigation* by Robert Fenwick Elliot, at pp 1–2, the following passage appears:
>
> (a) Lump sum contracts
>
> A lump sum contract is a contract whereby by the contractor agrees for a pre-agreed price to execute certain defined building works (the building work undertaken by the contractual obligation is usually called the 'Works'). In principle, the contract is very simple but in practice there are many complicating factors.
>
> The general rule in ordinary lump sum contracts is that the contractor is entitled to be paid the pre-agreed lump sum as and when he substantially completes the Works (*Hoenig v Isaacs* [1952] 2 All ER 176). Substantial completion does not necessarily entail the perfect execution of every detail of the Works, and if the contractor is guilty of only comparatively minor defects and/or omissions then he is entitled to be paid the lump sum less a set off in respect of his failings …
>
> …
>
> Although the lump sum is always the starting point, it is comparatively rare for the price the contractor is entitled to receive at the end of the day to be exactly the same as the lump sum. The lump sum is usually subject to adjustment for extra work, fluctuations sub-contractors, and so on:
>
> [15] At p 69 in *Keating on Building Contracts*, a lump sum contract is described as:
>
> …

A contract to complete a whole work for a lump sum, eg to build a house for £60,000. If the house is completed in every detail required by the contract the contractor is entitled to £60,000, and if extra work was carried out he may be able to recover further payment.

[37] Clause 3 of the contract as shown at p 235 of bundle 'B' provides for 'price' as per work order and shall remain firm for period of delivery and inspection work'. Hence, it is very obvious that the instance is a lump sum contract as submitted by the defendant as the amount fixed under the contract at p 1 of bundle 'B' RM1,790,000. Since the contract is a lump sum contract as has been decided in *CM Indah*'s case the plaintiff must prove that there is an agreement between the parties for variations and additional works in order for the plaintiff to recover further payments. PW1 in his evidence has acknowledged that any variation must be approved by the management of the defendant. He has further acknowledged that the defendant had vide a letter as shown at p 698, bundle C, rejected the plaintiff's variation claims in total. Hence, it is crystal clear, there was no agreement between the parties for any variation. Further, as submitted by learned counsel for the defendant, and upon scrutinising the evidence of PW1 I totally agree with learned counsel, that those works shown in the so called variation orders fall within the work scope of the plaintiff under the contract. PW1 has not denied these during cross-examination by the defendant.

[38] It is the plaintiff's contention that the plaintiff had upon being instructed by the defendant done various works and supplied various quantities of material which deferred from the bill of quantities in the work order. Due to these variations in the scope and quantity of materials in the bill of quantities the plaintiff had incurred additional costs for which it had invoiced the defendant. However as stated earlier, there is no evidence that the plaintiff actually did those works which differed from the bills of quantities. There is no evidence that the plaintiff did invoice for variation before the contract was terminated and no evidence that the defendant did make payment for the alleged variation works.

[39] Learned counsel for the plaintiff has argued that the tendering of exh D1 supports the plaintiff's case that the bills of quantities formed an integral part of the contract between the plaintiff and the defendant. D1 is a letter dated 20 August 2004 from STC to the plaintiff. My view on this letter is that it is a mere invitation to the tenderer ie the plaintiff, to participate in the project. It does not say that bills of quantities would be one of the documents to be attached to the contract. And what is more important is that the contract itself has never made any reference to any bills of quantities. In fact, if we look at cl 7 of the contract as shown at p 236 of bundle B, it provides for strict compliance with the specification as specified and no deviation is allowed

unless as agreed. As far as the evidence goes, there is nothing to show that the defendant has agreed to any deviation. The mere fact that quantities are submitted to the contractor for the purpose of tender, does not make them form part of the contract especially as in this case when the contract has provided specifically the specification to be followed and makes no reference to any bills of quantities. See *Keating on Construction Contracts*, (8th Ed), 2006, p 119.

[40] This contract between the plaintiff and the defendant is also in contrast with Pertubuhan Arkitek Malaysia's (PAM) Standard Form 1998 Edition with Quantities wherein cl 3 provides, inter alia, that bills of quantities and summary of tender form part of the contract and cl 12 specifically provides for contract sum for works set out in bills of quantities. The contract in the instant case does not have such clauses. Therefore what is not stated in the contract, cannot in my opinion be included.

[41] Next is the defendant's counterclaim. The first issue raised here is its entitlement to accrue agreed LAD.

[42] Clause 4 of the contract as shown at p 235 of bundle B provides for 'delivery' to be made 'by August 2005'.

[43] Clause 11 of the same as shown at p 238 of bundle B provides for LAD of '0.3% of contract value or RM 800 per day whichever is higher up to maximum 10% of contract value'.

[44] To me, those two clause imply that delivery of all items under the contract to site must be made by August 2005 and in the event of failure, the defendant shall be entitled to claim the LAD. The plaintiff through PW1 and also during submission has stated that 'BUT FOR the unlawful termination of the plaintiffs contract by the defendant, the plaintiff would have completed its obligation under the contract'; and hence 'the defendant is not entitled to any LAD'.

[45] However, PW1 himself, during cross-examination by learned counsel for the defendant, has admitted that the plaintiff had failed to deliver all items to the site by August 2005. In fact there was a letter at p 275 of bundle B wherein the plaintiff had requested for an extension of time for delivery to site from August 2005 to November 2005. This by itself is a clear proof that the plaintiff had failed to deliver all items by August 2005 as provided for by the contract.

[46] Even if the plaintiff tries to rely on this request shown at p 275 of bundle 'B' it is obvious from the evidence of PW1 during cross-examination that

deliveries only started in December 2005 which only means that even the November time line was not reached by the plaintiff.

[47] PW1 in his evidence has admitted that the items in the plaintiff's schedule of work at p 190 of bundle B were not delivered to site up to the termination but he argued that the plaintiff did not have the opportunity to deliver them as the contract was terminated. But we must remember that the contract was only terminated by the defendant on 22 November 2006 and the extension requested by the defendant was until November but the actual delivery was only done in December. So, I feel there is no logic in the plaintiff's argument. The fact remains crystal clear that the plaintiff had failed to comply with the time line imposed by the contract and hence the defendant must be allowed to claim the maximum LAD of RM179,000.

[48] Now comes the issue as to whether the defendant's termination is lawful. Section 40 of the Contracts Act 1950 (Act 136) states as follows:

> Effect of refusal of party to perform promise wholly
>
> 40 When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[49] It cannot be disputed that there were serious delays in the plaintiffs works under the contract and the defendant had sent many notices relating to the delay for example at p 621 before the termination and at p 660, after the termination. This was acknowledged by PW1 during his evidence in court.

[50] However PW1 gave two excuses for the delay. First that there was no electricity supply and he pointed to pp 41–42 of bundle B to support this allegation. However I find that letter only shows that there was no power supply at process area or O/S 6. The other area was not affected. The defendant, through DW2 had given evidence that there was a generator available with capacity sufficient for the usage on site and this piece of evidence was not challenged by the plaintiff. The second reason given by the plaintiff is that the plant was not ready. However PW1 acknowledged that the problems as stated at pp 41–42 of bundle B were in relation to 0/S1–4 only and were resolved by the SAT in November 2006.

[51] I agree with learned counsel for the defendant that what is crucial is the excuses by the plaintiff do not explain all the delays in the plaintiff's works. In particular, the excuses do not explain why the plaintiff seriously delayed in completing the SCADA and PLC programming, which the plaintiff acknowledged should have been completed off site before August 2005. In

actual fact, the plaintiff failed to do so long after August 2005 up to the contract termination in November 2006, which amounts to a repudiatory breach of contract by the plaintiff.

[52] On top of that, I also agree with the defendant that the plaintiff was in repudiatory breach of the contract when it demobilised from site from 20 November 2006. PW1 has admitted that the defendant through a letter on the same date as shown at pp 621–622 of bundle B had required the plaintiff to send back his men to site to work by 21 November 2006 but this was ignored by the plaintiff on the ground that it was only a one week's break, when the plaintiff was fully aware of the serious delay and the specific deadlines to be met.

[53] The plaintiff in my opinion was also in repudiatory breach of the contract when it removed the entire SCADA and PLC programming from the computers on site on 21 November 2011. This removal is an agreed fact as shown in bundle 'H'. And this removal was without the defendant's consent.

[54] PW1 also agrees that without the SCADA system programme and the PLC programme, the system was non-functional. The removal of the programming had serious repercussions to the defendant in relation to its obligations to its employer, Lembaga Air Perak. The plaintiff's action would most certainly have the effect of further delaying the works and exposing the defendant to serious risks under the main contract, including risk of termination.

[55] If we turn to p 197 of bundle 'B', the second part of cl 4 of the contract clearly provides as follows:

> All materials delivered to site shall be deemed to be absolute property of the company and shall not be removed without their prior permission.

[56] Hence it is obvious that the SCADA and PLC programming once delivered to site was deemed the property of the defendant and could not be removed without its consent.

[57] In such circumstances, I am of the view that the termination of the contract by the defendant was lawful. So, the answer to this issue is 'yes'.

[58] On the last issue, I am completely in agreement with the defendant's submission that the defendant, through the evidence of DW1 and DW2 as well as the documents at pp 24–65 of bundle F, 90–115 of bundle K, has successfully shown that the defendant had in fact incurred the cost of RM598,182.50. PW1 himself generally agreed during cross-examination that

the items and works in the documentary evidence adduced by the defendant are part of the plaintiff's scope of works. PW1 merely argues that the description on the defendant's orders including BQ nos. Do not coincide with that found in the contract. However, it is clear that DW2's answers during the cross examination for some of the items reveal that whether there is any non corresponding description of BQ numbers or not, the works were in substance part of the works required under the contract scope. For example, BQ 18 February 2011 as stated at p 47 of bundle F is the operating software for BQ 18 February 2011 at p 3 of bundle 'B'. Another example is p 49 of bundle F matches with p 3 of bundle B because the O/S 5 and O/S 10 at p 3 of bundle B would definitely includes wiring and terminal blocks as shown at p 49 of bundle B.

[59] The other general allegation made by PW1 is that the plaintiff had delivered some of the items to site earlier. However, PW1 has clearly acknowledged in his evidence that if any parts or items were faulty, then the plaintiff would have been obliged under the contract to replace the same.

[60] The defendant has also through DW1 adduced evidence at pp 116–122 and 69–2 of bundle K on supervision costs and consulting engineer's costs. In cross examination, the plaintiff has not challenged these at all. Now in his submission the learned counsel for the defendant has disputed the documents in bundle K on the ground that the makers were not called and it is not an agreed document. To this, I am reminded by learned counsel for the defendant of the general approach of the parties as informed to the court by learned counsel for the plaintiff itself when the trial began on 1 December 2011 ie all bundles of documents are agreed bundles and marked as exhibits. It is pertinent to note that the plaintiff was given every opportunity to cross-examine the defendant on these documents but chose not to. The plaintiff did not object to the authenticity of the documents during the trial or ask for the maker to be called. Hence, I opine, it is too late for the plaintiff to raise any objection against them now. Bundle K was part of the agreed bundle of documents and referred to during the trial. The mere fact that it is now disputed by the plaintiff does not in my opinion now make it inadmissible. Refer to the Federal Court's decision in *Desa Samudra Sdn Bhd v Bandar Teknik Sdn Bhd and 5 others,* [2012] 1 MLJ 729; (Rayuan Sivil No 02–9 Tahun 2011) delivered by YAA the Chief Judge (High Court of Sabah and Sarawak) dated 14 December 2011. In that case, the admissibility of the minutes of meeting dated 14 April 1998 was in question. YAA the Chief Judge (High Court of Sabah and Sarawak) said as follows:

39 The appellant seems to take the stand that the said minutes was not tendered in evidence (and hence the manner in which the question was posed). The respondents on the other hand argued that the said Minutes in actual fact formed part of the agreed bundle at trial and was in fact extensively referred to by the parties at trial as D9–12. The respondents acknowledge that at the trial, the appellant did object to the said Minutes, but the court merely noted down the objection and proceeded. At no point was it rules that the said minutes were inadmissible. Parties continued to refer to the minutes thereafter.

40 We therefore agree with the respondent's argument. In the law governing documentary evidence, as in oral evidence, three matters come to mind — relevancy, admissibility, and weight. They must be considered in that order. Only evidence which is relevant ought to be admissible. Irrelevant evidence should be rendered as inadmissible and the matter ends there. Now, relevant evidence which is rendered admissible is still subject to the element of weight. The court can either attach due weight to the evidence, or some weight, little weight, or no weight at all. Due regard must be given to the authenticity of the evidence, its source, its contents and more importantly, the surrounding circumstances of the case. This is where contemporaneous evidence would come in handy.

41 Having considered the circumstances of the case, we are of the view that the said minutes were part of the agreed bundle of documents and were indeed referred to extensively by the parties. An objection was raised and noted at the outset, but at no point did the learned trial judge rule that the said minutes were inadmissible. The mere fact that a document is disputed or objected to does not by itself render the document inadmissible. Parties continued to refer to the minutes at trial as D9–12. Hence, the appellant's approach to the question posed is a non starter in actual fact.

CONCLUSION

[61] After hearing and considering the evidence before me and the submissions by learned counsel for both parties, on the balance of probability I must say that I agree fully with the defendant that the plaintiff has failed to prove its claim while the defendant on the other hand has proven its counterclaim. Hence, I dismiss the plaintiff's claim and allow the defendant's counterclaim with costs.

Plaintiff's claim dismissed and defendant's counterclaim allowed with costs.

Reported by Ibnu Aswan